IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 196 OF 2005

Chandrakant R. Tidke & Ors. ..Appellants

versus

Smt. Akkubai G. Chafalkar & Ors ..Respondents

Mr. S. P. Thorat for the Appellants.

Ms. Varsha Palav for the Respondents No.1 and 2.

CORAM : D. G. DESHPANDE,J.

DATE : 25TH AUGUST, 2005

P.C. :

1. Heard.

2. Plaintiffs had filed a suit for specific performance and that was decreed by the trial court. The Respondents filed Appeal, the appellate court refused to exercise discretion in favour of the plaintiffs. Sound, convincing and legally tenable reasons have been given by the court in paragraph 17 and also in paragraph 18. The same reads as under:

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"17. The jurisdiction to decree the specific performance is discretionary, and

the court is not bound to grant such relief merely because it is lawful to do so. This discretion is to be exercised judiciously and not arbitrarily. In the instance case, in the year 1980, when plaintiffs entered into a contract, to purchase the suit property with defendant Nos. 1 and 2, all of them were in need of open space to construct a residential accommodation for themselves. It has come in the evidence of Chandrakant Tidke (PW 1) that all the plaintiffs are now residing in their own houses. Previously, all the plaintiffs were residing as tenant, in the house owned by Bansilal, situated at Nashik Road, but now plaintiff No.3 is residing at Nashik Road, plaintiff No.2 is residing at Nashik near Dwarka point and plaintiff no.1 is residing in his own house, situated at Nashik Road. The husband of Plaintiff No.4 has his own house in Shikarewadi at Mashie Road. Admittedly, defendant No.1 is residing in a shed which is in the suit property. She has been residing there along with her sons and husband. When all the plaintiffs have been accommodated in their own houses, the purpose for which they entered into an agreement to purchase the suit property does

not now exist. As against this, the defendant No.1 is residing in a shed, which stands in the suit property. She has been residing in a shed, which stands in the suit property. She has been residing there right from the year 1971. If the decree for specific performance is granted, the defendant no.1 will have to be dispossessed and she will be put to difficulties. It is established that Block No. 7 adjoining to the suit property is owned by defendant No.1's husband. The 7/12 extract of the said block is produced at Exh. 70. From the 7/12 extract of that property, it is seen that the said block no. 7 is owned by defendant No.1 is husband and one Kolappa jointly. There is no evidence on record to show that this block is still vacant, to which defendant No.2 had shifted her residence. In enforcing the agreement of sale, the plaintiffs will have to obtain permissions under the Land Ceiling Act. It has been contended on behalf of the defendants that defendants belong to Wadar community. On behalf of the defendants, it is not shown that the sale of the land owned by Wadar community is hit by any provision of the existing law. From the evidence

brought on record, it is proved that husband of defendant No.2, who is also a brother of defendant No.1 is a big contractor. The bond writer Bajpeyee (PW-4) has stated that Bhima who is the husband of defendant No.1 purchases stamp from him regularly, as those stamps are required by him for preparing documents in connection with the contracts, which he accepts. Husband of defendant No.1 works with his brother, who is husband of defendant no.2. The husband of defendant No.2 is residing in a Bunglow, however husband of defendant No.1 is still residing in a shed, which exists in the shed. The financial condition of defendant No.1's husband may be sound, but husband of defendant No.1 seems not to be so sound, and therefore, if defendant No.1 is required to loose the possession of the suit property, she will be put to difficulties. The plaintiffs had purchased the suit property for construction of their own houses, but now that purpose does not exist, as all plaintiffs have built their houses elsewhere, and therefore, refund of earnest to them with interest and amount of compensation will be an adequate remedy.

18. In the instant case, it is seen that all the plaintiffs entered into a contract with a hope that they will get some land to construct their houses. All the plaintiffs showed fairness in dealing with the defendants. The defendants, with the help of their husbands, who are the contractors, avoided to execute the sale deed in terms of an agreement obviously hoping that by selling the suit property to the others, they will get more price. All the defendants must be put to untold inconvenience when they were required to purchase the property elsewhere, after their contract with the defendants got frustrated, because of refusal on the part of defendant Nos. 1 and 2 to execute it. The plaintiffs must have required to pay more to get the property elsewhere, and therefore, they must be compensated adequately. In the instant case, on behalf of the plaintiffs, reliance is placed on the ruling in Prakash Chandra vs. Angadlal, reported in AIR 1979 S.C. 1241, that "a compensation is an adequate remedy, and therefore, instead of granting specific performance, granting compensation will serve the ends of justice." In the instant case, the amount of Rs.30,000/-

> claimed by the defendants by way of compensastion is an adequate sum, and it should be decreed."

Appellants are compensated by payment of Rs.30,000/- with interest in addition to Rs.10,000/-. The discretion is properly exercised. There is no rule of law that merely because the agreement of sale is proved, the decree for specific performance follow. I do not find any error on the part of the appellate court, there is no merit in this appeal, the same is dismissed.

25.8.2005 (D.G. DESHPANDE, J.)